

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the License
of Angela Dupree to Provide Family
Child Care under Minnesota Rules,
Parts 9502.0300 to 9502.0445

**FINDINGS OF FACT,
CONCLUSIONS
AND RECOMMENDATION**

The above-entitled matter came on before Administrative Law Cindy L. Lavorato ("ALJ") on September 16, 2008 for hearing. The hearing was scheduled pursuant to a Notice of and Order for Hearing dated August 25, 2008 from the Department of Human Services ("DHS").

Michael Q. Lynch, Assistant Hennepin County Attorney, appeared on behalf of the Department of Human Services and the Hennepin County Human Services and Public Health Department (the Department). The Licensee, Angela Dupree, did not appear in person or by counsel.

STATEMENT OF THE ISSUE

The issue is whether the Department of Human Services' order of temporary immediate suspension of Licensee's family day care license should be continued.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On August 22, 2008, the Department (Hennepin County Human Services and Public Health Department) recommended that the Licensee's license be temporarily and immediately suspended.^[1] This recommendation was based on a report received by the Department from the Minneapolis Police Department indicating that the home where the Licensee operated her daycare business had been extensively damaged by a house fire on August 15, 2008.^[2]

2. On August 22, 2008, an Order of Temporary Immediate Suspension was personally served on the Licensee at the address of her daycare home in Minneapolis, Minnesota.^[3]

3. The Licensee received the Order of Temporary Immediate Suspension. She subsequently filed a timely request for administrative appeal of the Order with the Department of Human Services (DHS).

4. On or about August 25, 2008, DHS issued a Notice of Hearing in this matter indicating that the hearing would take place on Tuesday, September 16, 2008, at 9:30 a.m. in the Health Services Building, Room 111, 525 Portland Avenue, Minneapolis, Minnesota 55415. However, DHS attempted to serve that Notice of Hearing on the Licensee at an incorrect address.^[4]

5. On August 29, 2008, the Department reissued the Notice of Hearing and served it on the Licensee by certified mail, return receipt requested, at the correct address of her day care home.^[5]

6. The U. S. Postal Service did not return the Notice that was sent to the correct address of the Licensee's day care home as either undelivered or undeliverable.

7. The Notice of Hearing included the following language:

Failure to appear at the hearing or prehearing conference will result in the allegations of the Notice of and Order for Hearing, including the incorporated order, being taken as true. This means that the action being appealed will be upheld.

8. The Licensee did not appear at the hearing, nor did she obtain the ALJ's prior approval to be absent from the hearing.

9. Additionally, 15 minutes after the hearing began, the ALJ telephoned the Licensee at the telephone number provided to the Department to determine if there was some reason why the Licensee had not appeared. The call was met with a recorded message indicating that it was the phone number of the Licensee and asking that a message be left. The ALJ advised the Licensee that she was to have been present at the hearing and also provided a cell phone number where the Licensee could return the call. The ALJ has received no response from the Licensee.

10. Because Licensee failed to appear, she is in default.

11. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice of and Order for Hearing may be taken as true and incorporated by reference into these Findings of Fact.

12. On August 18, 2008, the Department received notification from a Minneapolis Fire Inspector that a fire had occurred at the Licensee's residence on August 15, 2008. The fire inspector reported that the home was not habitable.^[6]

13. On August 21, 2008 the Department made an unannounced visit to the Licensee's daycare home based on information that the Licensee was continuing to operate her business at an unlicensed home.^[7]

14. At that time, the Licensee was discovered at a nearby unlicensed location providing daycare services to eight children, only four of whom were her own. She did not then permit the Department to inspect the home.^[8]

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The ALJ and Department are authorized to consider the charges against Licensee under Minn. Stat. § 245A.08 and Minn. R. 1400.8505 to 1400.8612.

2. Licensee received due, proper and timely notice of the charges against her, and of the time and place of the hearing. This matter is, therefore, properly before the Department and the ALJ.

3. The Department has complied with all relevant substantive and procedural legal requirements.

4. Pursuant to Minn. Stat. § 245A.07, subd. 2., in order to sustain a temporary immediate suspension, the Department must show that reasonable cause exists to believe that Licensee's failure to comply with applicable law or rule poses a current imminent risk of harm to the health, safety, or rights of persons served by Licensee.

5. When a temporary immediate suspension is appealed, the scope of the appeal hearing is limited solely to the issue of whether the temporary immediate suspension "should remain in effect" pending a final order issued on a subsequent licensing sanction. Further, the burden of proof is limited to the Commissioner's demonstration that reasonable cause "exists" to believe that the license holder's actions or failure to comply with applicable law or rule "poses" an imminent risk of harm to the health, safety, or rights to those served by the licensee. Thus, the Administrative Law Judge is required to address the current situation and not only whether the temporary immediate suspension was properly issued at the time and not just whether reasonable cause existed at the time the temporary immediate suspension was issued.

6. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations of, and the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence.

7. The Licensee is in default herein as a result of her failure to appear at the hearing.

8. All allegations in the Notice of and Order for Hearing are adopted as true.

9. Minn. R. 9502.0335 provides as follows:

- A. If, in the judgment of the agency representative, a potentially hazardous condition may be present, due to a violation of parts 9502.0315 to 9502.0445, the applicant shall obtain an inspection from a fire marshal, building official or agent of a board of health as authorized under Minnesota Statutes, section 145A.04 to verify the absence of hazard and report to the agency.
- B. The residence must comply with any applicable local ordinances. If the commissioner or the agency has reasonable cause to believe a hazardous condition may be present and requests an inspection by a fire marshal, building official, or authorized agent, then any condition cited by a fire marshal, building official, or other authorized agent as hazardous and creating an immediate danger of fire, or threat to human life and safety, must be corrected or a variance approved in accordance with subparts 8, 8a and 8b prior to issuance of a license.

10. The Licensee has not obtained an inspection, nor has she taken action to correct the fact that the home where she was operating a daycare was deemed by the Minneapolis Fire Department to be "not habitable."

11. The Licensee failed to comply with Minn. R. 9502.0375 which provides:

Subpart 2. Other reporting.

The provider shall inform the agency:

...

C. Within 48 hours after the occurrence of a fire that requires the service of a fire department so the agency may determine continued substantial compliance with parts 9502.0315 to - 502.0445.

12. The Department has demonstrated that it has reasonable cause to believe that the condition of Licensee's licensed daycare home does not presently comply with the requirements for licensure under Minn. R. 9502.0315 to 9502.0445, and that the premises pose a "risk of harm to the persons served by the program."

13. The immediate temporary suspension of Licensee's daycare license should remain in effect until a final licensing sanction is determined.

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: the DHS affirm and continue the Temporary and Immediate Suspension of Licensee's license to provide child care.

Dated: September 29, 2008

s/Cindy L. Lavorato

Cindy L. Lavorato
Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. Under Minn. Stat. §§ 14.61, the parties adversely affected have ten (10) calendar days to submit exceptions to this Report and request to present argument to the Commissioner. The record shall close at the end of the ten-day period for submission of exceptions. The Commissioner then has ten (10) working days from the close of the record to issue his final decision. Parties should contact the Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

^[1] Ex. 2.

^[2] Ex. 3.

^[3] Ex. 1.

^[4] ALJ Ex. 1.

^[5] Ex. 4.

^[6] Ex. 2.

^[7] Testomony of Tim Hennessey.

^[8] *Id.*